



OFFICE OF THE POLICE COMMISSIONER
ONE POLICE PLAZA • ROOM 1400

October 15, 2013

Memorandum for: Deputy Commissioner Trials

Re: Detective Rafael Astacio
Tax Registry No. 914287
Military and Extended Leave Desk
Disciplinary Case No. 2010-2512

CHAN:

The above named member of the service appeared before Deputy Commissioner Martin G. Karopkin on October 4, 2013 and was charged with the following:

DISCIPLINARY CASE NO. 2010-2512

1. Said Detective Rafael Astacio, while on duty and assigned to Detective Bureau Manhattan Special Victims Squad, on or about and between September 18, 2007 and March 22, 2009, did engage in conduct prejudicial to the good order, efficiency or discipline of the Department, to wit: said Detective, did fail to properly perform his duties, including but not limited to, conducting a proper interview of a suspect, timely picking-up and vouchering rape kits and their results, providing accurate information on DD5s, conducting complete and proper investigations, conducting proper identification procedures, properly closing cases, preparing proper worksheets documenting investigative steps taken, and providing and relaying accurate information to other investigators.

PG 203-10, Page 1, Paragraph 5 PUBLIC CONTACT – PROHIBITED CONDUCT – GENERAL REGULATIONS

In a Memorandum dated October 4, 2013, Deputy Commissioner Karopkin Dismissed the sole Specification, in part. Deputy Commissioner Karopkin further found Detective Astacio GUILTY, in part, and NOT GUILTY, in part, of the sole Specification. Having read the Memorandum and analyzed the facts of this instant matter, I approve the findings, but disapprove the penalty.

The misconduct in this matter warrants that Detective Astacio forfeit thirty (30) Suspension days to be served and be placed on One-Year Dismissal Probation.

Raymond W. Kelly
Police Commissioner



POLICE DEPARTMENT

October 4, 2013

MEMORANDUM FOR: Police Commissioner

Re: Detective Rafael Astacio
Tax Registry No. 914287
Military & Extended Leave Desk
Disciplinary Case Nos. 2010-2512 & 2012 7551

The above-named member of the Department appeared before me on September 12, 2013 and September 13, 2013, charged with the following:

Disciplinary Case No. 2010-2512

1. Said Detective Rafael Astacio, while on-duty and assigned to the Detective Bureau Manhattan Special Victims Squad, on or about and between September 18, 2007 and March 22, 2009, did engage in conduct prejudicial to the good order, efficiency or discipline of the Department, to wit said Detective, did fail to properly perform his duties, including but not limited to, conducting a proper interview of a suspect, timely picking-up and vouchering rape kits and their results, providing accurate information on DD5s, conducting complete and proper investigations, conducting proper identification procedures, properly closing cases, preparing proper worksheets documenting investigative steps taken, and providing and relaying accurate information to other investigators.

P.G. 203-10, Page 1, Paragraph 5 – PUBLIC CONTACT – PROHIBITED CONDUCT – GENERAL REGULATIONS

Disciplinary Case No. 2012-7551

1. Said Detective Rafael Astacio, while off-duty and assigned to the Detective Bureau Special Victims Sex Offenders Monitoring Division, on or about June 3, 2012, did engage in conduct prejudicial to the good order, efficiency or discipline of the Department, to wit: said Detective did, while acting in concert with others, enter a residence and remove property.

P.G. 203-10, Page 1, Paragraph 5 - PUBLIC CONTACT – PROHIBITED CONDUCT GENERAL REGULATIONS
NYS PENAL LAW 140.25 (2) BURGLARY IN THE SECOND DEGREE

2. Said Detective Rafael Astacio, while off duty and assigned to the Detective Bureau Special Victims Sex Offenders Monitoring Division, on or about June 3, 2012, did knowingly associate with persons reasonably believed to be engaged in, likely to engage in or to have engaged in criminal activities.

P.G. 203-10, Page 1, Paragraph 2 (C) - PUBLIC CONTACT – PROHIBITED CONDUCT – GENERAL REGULATIONS

The Department was represented by Javier R. Seymore, Esq., Department Advocate's Office, and Respondent was represented by James Moschella, Esq. and Peter Brill, Esq.

Respondent, through his counsel, entered a plea of Not Guilty to the subject charges. A stenographic transcript of the trial record has been prepared and is available for the Police Commissioner's review.

DECISION

Disciplinary Case No. 2010-2512

The single Specification is Dismissed in Part, and Respondent is found Not Guilty in Part and Guilty in Part.

Disciplinary Case No. 2012-7551

This case, at this time, is the subject of a court ordered stay.

BACKGROUND

Respondent was served with charges on Disciplinary Case No. 2010-2512 on September 9, 2010. The case first appeared on the trial calendar on February 7, 2012. It was adjourned on February 28, 2012, March 20, 2012, April 3, 2012, May 1, 2012 and May 15, 2012 to address pre-trial matters. On May 15, 2012, a trial date of July 10, 2012 was

set. [REDACTED]

[REDACTED]

On July 5, 2012, new disciplinary charges were served related to the Suffolk County arrest under Disciplinary Case No. 2012-7551.

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

2013 [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

On September 9, 2013, the Department announced its intention to proceed on Disciplinary Case No. 2010-2512 by itself. [REDACTED]

[REDACTED] As the parties were not ready to proceed on that date, the trial was scheduled to commence on September 12, 2013.

¹ On the second day of trial the Assistant Department Advocate (Advocate) corrected his statement and indicated that Respondent would attain his 20th year of service on October 23, 2013.

Respondent, it should be noted, objected to proceeding on any case on an expedited timetable. Respondent noted that he has not submitted any retirement papers and that both of these matters have been pending for an extended period already. I ordered an expedited proceeding as requested by the Department. I have also prepared the following decision in an expedited manner, again as requested by the Department.

OVERVIEW

Looking at the single specification in this case along with the Bill of Particulars which purports to explain the misconduct in detail; it would appear that Respondent had, over a period of time, from September 2007 to March 2009, completely disregarded his duties as a Detective in the Special Victims Division (SVD). Six investigative cases are set forth which purport to demonstrate that Respondent's incompetence or willful misconduct undermined sex crimes investigations. Indeed because the statute of limitations would clearly be applicable to most of the events, the Department argued that there was a continuing course of misconduct involved, which would take all the events within the statutory period.

While the Department initially offered a plea involving the loss of 45 vacation days and dismissal probation it is now recommending that Respondent be dismissed from his position with the Department. Indeed the Department has insisted that the case, which had lain dormant for about one year, be processed immediately so that Respondent can be dismissed before his twentieth year of service and thereby denied a pension. Clearly the stakes in this case are high.

It is therefore surprising that virtually the entire case is based on one witness, Sergeant Karena Saladeen-Patel, an investigator on the disciplinary case. Indeed Saladeen-

Patel's testimony was the only evidence offered by the Department as there were no documents or exhibits of any kind put into evidence. Much of the accusatory information Saladeen-Patel had was based on interviews she conducted with [ADA 1] a former Assistant District Attorney (ADA) who had been head of the New York County District Attorney's Special Victims Bureau and the person who initiated the complaint against Respondent.

Saladeen-Patel testified that "[ADA 1] is the only contact I was allowed to speak to for anything." Saladeen-Patel advised this Court that [ADA 1] refused to let her interview ADAs involved in the cases at issue. She refused to allow Saladeen-Patel to interview the investigator who was a key witness in one of the cases. Saladeen-Patel also testified that [ADA 1] would not allow her to review the District Attorney's files or materials. One of the alleged acts of misconduct involves a situation in which [ADA 1] informed Saladeen-Patel of a suppression ruling. Saladeen-Patel testified that [ADA 1] refused to provide transcripts of the hearings related to this ruling or the judicial order. The Advocate did not offer these documents and based on discussion had during the trial and court testimony it appears that the Advocate did not attempt to independently obtain these documents.²

It would appear then that some of the accusatory information was double hearsay; that is, an ADA or other DA employee told something to [ADA 1] who told Saladeen-Patel who testified in this forum.

Although this case has one specification that specification contains many elements and lacks specificity. In an attempt to better understand what the charges were, I ordered a

² Because the case had been sealed, an unsealing order would have been required.

Bill of Particulars.³ That Bill of Particulars indicated that there are six investigative cases in which Respondent was alleged to have engaged in misconduct. The Bill of Particulars and Saladeen-Patel's testimony tracked these six cases which are identified by their Detective Bureau case number. Respondent's testimony also tracks the six cases. For clarity and to the extent possible, the following summary of evidence also tracks these cases in the same order.

SUMMARY OF EVIDENCE PRESENTED

The Department's Case

The Department called Sergeant Karena Saladeen-Patel as its sole witness.

Sergeant Karena Saladeen-Patel

Saladeen-Patel is a 21-year member of the Department. She was assigned to the Chief of Detectives Investigations Unit (CDIU) in 2009 where she investigates "out-of-guideline cases," and misconduct. She testified that Respondent was the subject of an investigation due to improper and incomplete investigations of cases assigned to him.

The first allegation of improper investigation against Respondent was made by Chief Shortell from Special Victims Squad (SVS), identifying one case, case No. 2007-432, another allegation was made by the Internal Affairs Bureau (IAB), a third allegation was made by ADA 1 Chief of the New York County DA's Special Victims Bureau. The last allegation was made by ADA [REDACTED] ADA 2 ADA 1 Deputy Chief. Although there are

³ Three orders were given for a Bill of Particulars, the first, on April 3, 2012 a second on April 19, 2012, because the first submission still lacked specificity, and a third on May 1, 2012, because the second lacked, among other things, dates. The Bill of Particulars referenced in this decision was submitted in response to my third directive and appears to have been served on May 15, 2012.

four individuals who made allegations against Respondent, only one log number was generated based on Shortell's complaint.

Initially, ADA 1 told Saladeen-Patel that the Manhattan SVS was closing their cases too quickly and that "was due to them not properly doing all their steps, that the detectives were yelling at the victims and saying inappropriate things such as the DA (District Attorney) is going to make you look like a slut on trial. They also threatened the victims that they're going to lock them up." Saladeen-Patel interviewed ADA 1 who identified Respondent as the individual who was conducting the incomplete investigations.

ADA 1 indicated a total of six cases. ADA 1 had multiple conversations with Saladeen-Patel during which ADA 1 clarified each complaint. The initial conversation with ADA 1 occurred on December 10, 2009. ADA 1 gave Saladeen-Patel the complaint numbers and the case numbers of the specific cases that were improper: Case Nos. 2007-372, 2007-432, 2008-359, 2008-397, 2009-082 and 2009-094. Saladeen-Patel testified that all information regarding the aforementioned cases was from ADA 1. Saladeen-Patel was not allowed to interview individual ADAs assigned to the cases.

Case No. 2007-372

In this case, Saladeen-Patel stated that Respondent continued to interrogate a suspect after the suspect requested an attorney. ADA 1 told Saladeen-Patel that according to ADA Rachana Pathak, the ADA who handled the suspect's case, the judge presiding over the case had, "thrown out the case" because Respondent had infringed on the defendant's right to counsel. Saladeen-Patel searched the case file for any evidence indicating whether Respondent had read the suspect his Miranda warnings, but did not find anything at the time.

Saladeen-Patel then conducted a Department interview with Respondent where Saladeen-Patel came to learn that Respondent and another detective had gone to the state of Georgia and apprehended the suspect and, during a videotaped interview with the suspect, Respondent read the suspect his Miranda warnings. During this interview, the suspect asked Respondent if he [the suspect] should have a lawyer, to which Respondent asked, "Do you want a lawyer?" The suspect replied that he did not want a lawyer and would answer the questions. The presiding judge suppressed the statements made by the suspect. The DA's office did not allow Saladeen-Patel to review the DA's case file nor did she retrieve the judge's order. **[ADA 1]** denied all of Saladeen-Patel's requests for case files as the case was sealed at the time. Saladeen-Patel did not review the videotaped interview or the transcripts. She received all of her information from **[ADA 1]**

On cross-examination regarding Case No. 2007-372, Saladeen-Patel conceded that the only individuals she had an opportunity to directly interview were the social worker, **[ADA 1]** **[ADA 2]** and Detective Lane. Lane was the other detective who accompanied Respondent to Georgia. Lane stated that Respondent read the suspect his Miranda rights but Lane had said he was not in the room when the suspect allegedly requested an attorney. Saladeen-Patel did not have independent information regarding this incident and she was not allowed to watch the videotaped interview with the suspect. Saladeen-Patel could not verify whether Lane stepped out of the room during the suspect's videotaped confession. Further, Saladeen-Patel did not have any court documents to indicate what actually occurred during court proceedings regarding this case. Saladeen-Patel agreed that **[ADA 1]** received her information about this case from the ADA who was at the suspect's court proceedings. **[ADA 1]** is no longer an employee of the New York County DA's office.

Saladeen-Patel guessed that the current Chief of Detectives, Chief Pulaski (Pulaski), was appointed in 2011. Saladeen-Patel was also in CDIU under Pulaski's predecessor, Chief Brown (Brown). She agreed that procedural steps required by detectives under Pulaski differ from those required by Brown. Saladeen-Patel stated that some differences she noticed were that Pulaski issues detective memos, stays on top of procedures and gives the procedures better guidelines. On the other hand, under Brown, a procedure called "a basic dozen" was used. Pulaski "expanded the basic dozen so all the steps are followed, and then revisits those steps again to make sure everything is done." Saladeen-Patel agreed that Pulaski's policies are clearer than Brown's policies.

Saladeen-Patel communicated with ADA 1 via e-mail and phone but the phone conversations were not transcribed after the initial conversation which had occurred somewhere around December 10, 2009. Saladeen-Patel did, however, document the other conversations.

Saladeen-Patel agreed that ADA 1 had been employed by the New York County DA's office for 26 years and that her relationship with the Manhattan SVS was possibly the lowest point in her entire career. ADA 1 also told Saladeen-Patel that not only did she have issues with detectives in this case, but also with other detectives in the past. ADA 1 believed that Respondent and Detective Ulan were not being effective at the time. Ulan did not receive charges and specifications.

Saladeen-Patel requested the Miranda form from Respondent and agreed that it was not falsified in any way. Respondent interviewed the suspect in Georgia on September 26, 2007.

Case No. 2007-432

This case involved a rape kit that was invoiced one year after it was prepared, and therefore not in a timely manner. Saladeen-Patel spoke to ADA [ADA 3] who made this complaint against Respondent. After she reviewed Respondent's case folder, Saladeen Patel learned that Respondent did prepare a DD5 indicating that he found that the results were negative for the Office of the Chief Medical Examiner (OCME). However, Respondent received the results of the rape kit from Detective Frasier who received the results of the kit via phone call. According to the DD5 prepared on December 12, 2007, Respondent did not obtain the report from the OCME, nor did he invoice or test the rape kit. The rape kit remained in the hospital.

Saladeen-Patel explained that a rape kit is prepared and invoiced by a uniformed member of the service and remains in the hospital. She explained that hospital personnel inform the respective precinct when the kit is ready and a member of the service picks up the rape kit and invoices it. When the rape victim authorizes release of the rape kit, the kit is sent to the lab for testing. The OCME then prepares a report and the results are entered into the DD5. However, this procedure may differ if the assigned detective is aware that the kit needs to be picked up from the hospital. In this case, the detective's supervisor needs to make sure that the kit is processed properly. Here Respondent indicated that the results of the rape kit were negative when a test on the kit was not completed because the kit was still in the hospital.

One year later, the DA's office searched for the results of the rape kit but learned that the kit was still in the hospital. Lieutenant Lamboy retrieved the rape kit from the hospital and invoiced it. The rape kit was subsequently tested and returned with negative

results and the case was closed. The allegation of the rape occurred on September 25, 2007 and the rape kit was tested on October 28, 2008.

Saladeen-Patel conducted an official Department interview with Respondent and was told by Respondent that Frasier had received a phone call stating that the results of the rape kit were negative. Respondent further stated, Frasier told him that the results were negative and Respondent believed that the negative results pertained to this case.

On cross-examination regarding Case No. 2007-432 it was revealed that this case involved an individual who was staying at a men's shelter near [REDACTED] Hospital (Bellevue). This individual woke up in the middle of the night, believed he had been sodomized and made a complaint at [REDACTED] on October 23, 2007. This individual was then interviewed by Respondent and Frasier.

The previous case (Miranda rights case) and this case were two of Respondent's first cases while in the SVS. At the time of these two cases, Respondent had not taken the investigators course and was not trained as an investigator. Frasier, now retired, had more time with the Department than Respondent and Frasier was an experienced investigator in SVS. Saladeen-Patel did not attempt to interview Frasier.

Saladeen-Patel agreed that the rape victim eventually spoke to ADA 2 and his complaint essentially was that Frasier was not nice to him.

Saladeen-Patel did not find any evidence to contradict Respondent's statement that Respondent assumed that Frasier was referring to this case when Frasier told Respondent that the rape kit was negative. This case was closed about two years later because the rape kit returned with negative results.

Case No. 2008-359

ADA 1 told Saladeen-Patel that Respondent showed a picture of the alleged perpetrator to the complainant during a line-up. The photo of the alleged perpetrator was on the alleged perpetrator's cell phone which he dropped in the victim's bedroom. Saladeen-Patel reviewed Respondent's case folder and learned the DD5 indicated that Police Officer Montali from the 34 Precinct "had actually retrieved the cell phone from the victim herself who had seen the photo and gave it to the officer stating that that's the person who tried to rape me." Respondent informed his supervisor, Lamboy, that the victim saw the photo and Lamboy ordered Respondent to insert the cell phone photo into the photo array. Saladeen-Patel clarified that the victim found the cell phone in her bedroom, and saw the alleged perpetrator's photograph on the phone. The victim gave the cell phone to the responding officer and told the officer that this is the individual who had raped her.

ADA 1 told Saladeen-Patel that this identification process "hindered proper identification at court." Saladeen-Patel did not know the outcome of this case or whether the presiding judge suppressed the photo. She stated that this identification procedure was offered in court but was inadmissible because the victim's memory was tainted when she was shown the cell phone photo of the alleged perpetrator. Saladeen-Patel did not obtain a copy of any ruling by the presiding judge. Saladeen-Patel said she tried to retrieve a copy of the transcripts of the trial but was denied by ADA 1

Cross-examination regarding Case No. 2008-359 revealed Saladeen-Patel did not have the cell phone photo of the suspect so she was not able to compare that photo to the picture in the photo array. Saladeen-Patel also did not recall what she was told by

Respondent regarding the use of the picture and photo array, except she did recall that Respondent told her he was ordered by Lamboy to use it in the photo array. Since Saladeen-Patel did not transcribe her interview with Lamboy, she did not recall whether she questioned Lamboy regarding this case. Furthermore, Saladeen-Patel stated that a suppression hearing was not held regarding the photo array, but rather, the ADA made a unilateral decision to exclude the photo from evidence. At the criminal trial for this case the victim identified the suspect in court. Saladeen-Patel did not have any court documents and did not know the outcome of the case.

Case No. 2008-397

In this case, ADA [ADA 3] informed ADA 1 that in one of ADA 3's cases, Respondent informed [ADA 3] he had conducted a canvass of a hotel, although Respondent did not document it in his DD5. Saladeen-Patel reviewed Respondent's case folder but found no record of Respondent conducting a canvass in this case. During his Department interview, Respondent admitted that he did not conduct a canvass and that he merely drove the victim home. [ADA 3] interviewed the victim and gained more information on the hotel and on a possible perpetrator. Respondent also did not include the fact that he drove the victim home in the DD5. This incident occurred on or about October 10, 2008.

On cross-examination regarding this case, Saladeen-Patel said a canvass for surveillance videos was required here but not for the hotel as the victim already knew where the hotel was. Saladeen-Patel stated that she did not determine it to be a failure because it became a "he said/she said situation." [ADA 3] said she had a conversation with Respondent and Respondent told [ADA 3] he conducted a canvass but [ADA 3] could not

find any documentation in support of Respondent's canvass. Saladeen-Patel said that Respondent was supposed to conduct a canvass in this case. This underlying incident occurred on September 22, 2008.

Case No. 2009-082

This case involved a rape kit which was not picked up from the hospital. The rape crises center in the hospital contacted the DA's office and informed it that the kit needed to be picked up. Initially, the rape victim did not want to release the rape kit, but changed her mind a few days later. [ADA 4] the ADA handling the case, told [ADA 1] that on March 16, 2009, he observed Respondent in court and told him the rape kit was ready to be picked up. Respondent never picked up the rape kit. The case was closed and turned over to the DA's office because Respondent arrested the perpetrator on March 13, 2009.

Saladeen-Patel reviewed Respondent's case folder and interviewed the social worker handling this case. The social worker informed Saladeen-Patel that she informed [ADA 4] that the rape victim wanted the rape kit tested. The rape kit was eventually received by the lab on December 10, 2009; about nine months after the victim authorized its release.

During Respondent's official Department interview with Saladeen-Patel, Saladeen-Patel stated that Respondent denied having that conversation with [ADA 4]. Saladeen-Patel testified that, on Worksheet No. 2, dated March 9, 2009, Respondent indicated that the rape victim did not want to move forward with the rape case. A DNA analysis report was also prepared as a follow-up, but Saladeen-Patel did not know who entered the report into the case folder.

Cross-examination regarding this case indicates the rape kit was picked up and invoiced by Detective Rama on December 10, 2009. On December 10, 2009, Respondent was on scheduled vacation. An arrest on this case was made on March 13, 2009, and the DD5 closing this case was prepared on March 17, 2009.

Neither ADA 1 nor ADA 4 knew when Respondent was told to pick up the rape kit.

Case No. 2009-094

In this case, ADA 1 received an e-mail from Senior Investigator X (SI) in which SI stated that SI received an e-mail from Respondent in which Respondent said he went to the Marquis Nightclub (Marquis) to obtain a video but SI was unable to find a DD5 regarding this visit. Saladeen-Patel reviewed Respondent's case folder but did not find any information regarding the video. Saladeen-Patel did not interview anyone regarding this incident and she was denied a copy of the e-mail from SI.

████████ told ADA 1 and ADA 1 told Saladeen-Patel that SI went to the Marquis regarding a different case and learned that Marquis maintained surveillance videos 24/7 on a six-month loop.

During Saladeen-Patel's investigation, she learned that Respondent told Detective Alan Sandomir (also assigned to Manhattan SVS) that Respondent went to the Marquis to obtain the surveillance video, but was unable to. During Respondent's Department interview, he indicated that he did not canvass the Marquis for the surveillance video. The DA's office subsequently obtained the video and identified the perpetrator. A rape kit was also prepared and the perpetrator was identified as the individual who committed two other

rapes. [SI] apprehended the perpetrator who is now serving a three-and-a-half year prison term. Saladeen-Patel was not allowed to interview [SI]

On cross-examination regarding Case No. 2009-094, it was learned that it involved a victim who was visiting from [REDACTED]. There was no indication that the victim was going to be uncooperative even though she had to fly back to [REDACTED]. Saladeen-Patel interviewed ADA [ADA 2] about this case. She agreed that [ADA 2] told her that she had assigned [SI] to the case but did not mention anything about [SI] e-mail to [ADA 1]. Saladeen-Patel could not say if there was an inconsistency between what [ADA 1] and Balbert had told her about how [SI] had come into the case.

Although the video was not recovered by Respondent, a DNA match was made and the suspect was identified. The Department and the DA's office were aware of the suspect's identity. Saladeen-Patel agreed that [SI] went to the 10 Precinct where he spoke to another detective who informed him that [SI] could get the surveillance video going back for a longer period of time.

Although [ADA 1] told Saladeen-Patel that a complainant from one of these cases filed a Civilian Complaint Review Board (CCRB) complaint against Respondent, Saladeen-Patel could not find any evidence of the complaint.

Saladeen-Patel agreed that all of the cases, except for Case No. 2009-094, had occurred more than 18 months before her investigation. She did not think that all these cases were similar or connected in some way. Saladeen-Patel did not have any evidence of Respondent trying to stop other members of the service from finding out about this alleged misconduct.

On redirect examination, Saladeen-Patel testified that conducting a canvass is a basic investigatory step outlined in the Chief of Detective Memo.

Saladeen-Patel was able to obtain the surveillance video from the Marquis from the internet (Google.com) because it was a “media case.”

The New York County DA’s office considered bringing criminal charges for falsifying official documents against Respondent, but in order to proceed, Saladeen-Patel had to first prove that Respondent had falsified his DD5s and then obtain clearance from the DA’s office to officially interview Respondent.

Upon questioning by the Court, Saladeen-Patel said that the DA’s office did not bring any criminal charges against Respondent.

During re-cross examination, Saladeen-Patel stated that she did not have any document to conclude that Respondent had falsified Department documents.

Respondent’s Case

Respondent called Lieutenant Adam Lamboy. Respondent also testified on his own behalf.

Lieutenant Adam Lamboy

Lamboy, assigned to the SVS, supervised Respondent since 2007. Lamboy did not know whether Respondent had investigative training, other than Respondent’s training while in Vice Enforcement. Lamboy testified, “I found [Respondent] to be a good worker. There were times I found that there were some investigative steps that were not taken but I could say that about a lot of detectives in the office but I found [Respondent] to be a solid detective.”

Lamboy stated that [ADA 1] was terminated from her position in the DA's office but he did not know why. Lamboy said [SI] was also terminated from the DA's office but he did not know why. Lamboy said his relationship with [ADA 1] was "tumultuous." Lamboy explained that he and [ADA 1] had a difference of opinion on how an investigation should be conducted. [ADA 1] believed that all decisions regarding the investigation should be made by her and not the Department.

Lamboy testified that [ADA 1] expressed negative views about Respondent and several other detectives. Some detectives that [ADA 1] complained about were transferred. [ADA 1] complaints about the detectives were a factor in the transfer of the detectives.

Lamboy vaguely recalled the facts of Case No. 2008-359 and stated that he did not have an issue with having shown the victim a cell phone photograph of the perpetrator from the perpetrator's phone.

Lamboy signed off on Respondent's paperwork to close the cases based on the information that Respondent provided to him. Lamboy was aware of most of the allegations against Respondent. Lamboy said, "There were a few people, myself included, who I believed [ADA 1] seemed to find fault in much quicker than other detectives who she viewed favorably and who did similar mistakes." He continued, "And in some cases I actually think they did more egregious acts and they did not seem to be -- get the rap from her, myself included, and [Respondent] as well as a few others."

On cross-examination regarding Case No. 2007-372, Lamboy said that with respect to this case [Miranda case], he did not recall the facts of the case but recalled that Lane had been a member of the service for about 17 years.

On cross-examination regarding Case No. 2007-432, Lamboy stated that in 2007, the results of the rape kit were not uploaded into the ECMS and detectives relied on a “system of facts and it was unreliable, we did not always get the facts, and there was a lot of phone communication between the OCME and the individual case detective.” He continued, “And there were times the lab would call us, especially if we had already done an inquiry asking for the results of that kit.” Currently, every DNA result is automatically uploaded to a detective’s case file. Even if the case is closed administratively, it will generate a new DD5 prompting the investigator and a supervisor to view that.

Lamboy agreed that Respondent indicated that the results of the rape kit were negative while the kit was still unexamined and safeguarded in the hospital.

On cross-examination regarding Case No. 2008-359, Lamboy agreed that the photo from the suspect’s phone was shown to the victim before the photo array.

On cross-examination regarding Case No. 2008-397, Lamboy did not recall the allegation made against Respondent.

On cross-examination regarding Case No. 2009-082, Lamboy testified that the victim did not authorize release of the rape kit and therefore Respondent could not submit the rape kit to the lab. However, after the case was closed, the victim changed her mind and then released the kit. The victim contacted the DA’s office but Lamboy did not receive any communication informing him that the kit was ready to be picked up. ADAs would communicate directly with the assigned detective unless the ADA was not satisfied with the detective’s work, and in that situation, the ADA would contact the detective’s supervisor. Lamboy did not know if Respondent had received a phone call from the ADA

who asked Respondent to pick up the rape kit. At some time in 2009, Lamboy received a call from ADA **ADA 2** who asked Lamboy to pick up the rape kit.

On cross-examination regarding Case No. 2009-094, Lamboy testified that Respondent went to the Marquis to obtain a video but was told that either there was no longer a video or that there was no video system at all. Respondent documented this in a DD5 and Lamboy approved it. Subsequently, Lamboy learned that Detective Lane and **SI** had retrieved the video. At the time, Detective Lane was under Lamboy's supervision. Lamboy credited Respondent's position that he was not able to obtain the video and that is why Respondent documented it on the DD5. Lamboy stated that Respondent indirectly notified him that Respondent went to the Marquis to obtain a copy of the video since Respondent entered this event in the DD5.

Lamboy explained that there was a case review process by him and two other supervisors but "[w]ith the volume of cases, it's almost impossible to go through every DD5 with a fine-toothed comb. Could you point out a fault with every single case in any particular office? Absolutely. Was it a pattern of behavior? No, it was not." Lamboy admitted that during his Department interview he said that Respondent has a pattern of not documenting his actions regarding his case even after being instructed to by a supervisor. Lamboy explained that he can make this same statement about other detectives in SVS whom the DA's office favored. Lamboy believed that Respondent lacked some investigative skill that could have improved with time and proper training.

Respondent

Respondent maintained his position in the SVS even after receiving the charges and specifications in this case. Respondent, prior to the start of his ongoing criminal court

proceedings regarding an unrelated incident, had been assigned to SVS for three-and a-half years beginning in 2007. He was also assigned to Vice where he worked as an undercover for three years and in different Narcotics commands where he worked as an undercover for six years.

Prior to joining the SVS, Respondent did not have any training as an investigator, and while in SVS, Respondent did not receive any formal training as an investigator. Senior Detectives Montgomery (24 years with the Department) and Frasier (26 years with the Department) were assigned to help with Respondent's cases as a way for Respondent to learn his duties. Since Montgomery and Frasier had their own cases to investigate, Respondent was not given step-by step instructions on how to handle his cases.

Respondent agreed that he was part of a large group of undercover officers who were transferred to investigative track commands. At the time Respondent joined SVS, he was not familiar with the appropriate steps to handle a rape case, but learned the steps throughout his time there.

On direct examination regarding Case No. 2007-432, Respondent stated that it was his second case and involved a victim who alleged that he had been sodomized while he stayed at a men's shelter. Frasier was assigned to assist Respondent with the case and Frasier took the lead and interviewed the victim while Respondent took notes. Frasier did not find the victim's story credible and he did not know that the hospital had prepared a rape kit prior to their arrival as it had not been mentioned.

Respondent explained that at the time of the incident, he did not know the procedure on rape kit preparation.

At some time after the interview with the victim while Respondent was at work, Frasier approached him and told Respondent that "he [Frasier] received a phone call from the ME's office stating that the rape kit was negative, to do a DD5, to close out the case, and I wouldn't have to worry about the case ever again."

About seven months after this incident, Lamboy informed Respondent that the DA requested that the rape kit be picked up from the hospital. Respondent immediately submitted the rape kit to the lab for testing. Respondent closed the case again as the results of the rape kit came back negative.

On continued direct examination Respondent indicated that Case No. 2007-372 involved a woman who had gone out drinking with friends. The suspect had come back to her apartment and forcibly raped her. She knew where the suspect lived and Respondent did a search warrant on the apartment. The also had a "ping" on his cell phone and, he said, it led to Georgia.

Respondent testified that he and his partner went to the police in [REDACTED] Georgia. They explained the situation and were taken to the address where the phone had "pinged." They did surveillance on the house, the suspect's mother came out and told them her son was inside. They obtained permission to go in and the subject was arrested.

While they were still in Georgia the suspect was brought to the interview room where Respondent read him his Miranda warnings and had the suspect sign and initial next to each question indicating that the suspect understood the warnings. The suspect stated that he had a family lawyer. Respondent asked the suspect "if he wanted a lawyer in regards to this case. [The suspect] said he had nothing to hide and he preferred to answer questions." Lane and Respondent then questioned the suspect. The interview was

recorded both audio and video—and a compact disc containing a copy of the interview was given to Respondent. Respondent did not know that his interview was being recorded at the time. The compact disc was placed into the case file and submitted to ADA Pathak.

Pathak informed Respondent that the interview with the suspect would be suppressed. Neither Respondent nor Lane testified in the pre-trial hearing and Respondent did not know whether or not the interview was actually suppressed. Respondent stated that other evidence of the rape included bed sheets, semen and the victim's hair fibers on the bed sheets. A criminal trial proceeded against the suspect and the suspect was found guilty. Although Respondent testified at the trial, he did not testify regarding the interview with the suspect.

Respondent testified that ADA 1 "didn't care for our unit at the present time I was there." In addition, Respondent said that on several occasions, other ADAs told Respondent that ADA 1 was not happy with him and did not like him on a "personal level." Balbert also felt the same way about Respondent.

On direct examination regarding Case No. 2008-359 Respondent stated that he received the case file from the police officer who initially responded to the scene. The case file contained a Blackberry cell phone that was left behind by the suspect. The suspect, before he fled from the victim's home, dropped his cell phone behind and the victim retrieved the cell phone and observed the suspect's photograph. The suspect's photograph was his screen saver on his cell phone. The victim identified the suspect as the individual who attacked her to the responding officers.

Respondent did not show the victim the cell phone photograph of the suspect during the initial interview. The first step Respondent took to identify the suspect was to show the

suspect's photograph from Photo Manager (online photo database). The victim was unable to select the suspect from Photo Manager. Respondent then used the subscriber information from the cell phone and retrieved a mug shot of the suspect from a previous arrest. The mug shot was included in the photo array but the victim did not make a positive identification. Lamboy then instructed Respondent to enlarge the suspect's cell phone photo and show it to the victim. Respondent and three other detectives, Fiol, Gutierrez and Suarez, all objected to having the victim shown the cell phone photograph. The photo was shown to the victim and a positive identification was made. A second positive identification was made during a line-up.

Subsequently, Respondent was contacted by the ADA in charge of this case. The ADA explained that the victim's memory was tainted when she was shown the cell phone photograph of the suspect. When Respondent informed Lamboy of this conversation with the ADA, Lamboy said, "[Respondent] work[s] for the NYPD and he felt that showing her the photo wouldn't hurt the case and they would have to deal with it." Respondent later learned that the suspect pled guilty to a lower charge.

On direct examination regarding Case No. 2008-397 Respondent stated that a group of coworkers went out drinking after work. Two coworkers remained in one bar while the others went home. The victim recalled that she went to a hotel. She and the alleged perpetrator woke up the following morning, got dressed, and the victim then entered a cab to go shopping on Fifth Avenue. The victim then went to the hospital [and alleged that she had been raped]. The hospital referred her to Manhattan SVS. Respondent explained that he did not conduct a canvass because at the time of this incident, Chief Brown was in

charge, and under Brown, a canvass did not need to be conducted if the victim and the perpetrator knew each other.

After interviewing the victim, Respondent drove her home and prepared more paperwork. The next day, he notified and conferred with ADA 1 regarding this case. Respondent did not know if he was supposed to document the fact that he drove the victim home on the DD5. Respondent agreed that investigative steps are typically documented on the DD5 and taking the victim home was not an investigative step.

Respondent forwarded all documents to the DA's office. The ADA informed Respondent that she would interview the victim and the alleged perpetrator and get back to Respondent. A few weeks later Respondent received a phone call from the ADA who indicated that ADA 1 and ADA 2 did not want to move forward with the case. An arrest was not made and the case was subsequently closed.

Respondent testified that neither the DA's office nor his immediate supervisors requested the location of the hotel from him.

On direct examination regarding Case No. 2009-082 Respondent testified that the complainant in this case, a rape victim, indicated that she did not want to proceed with the case and did not authorize the release of the rape kit. The victim already knew who the perpetrator was and provided the suspect's pedigree information. The perpetrator was tracked down and arrested. The incident occurred on March 9, 2009, and the perpetrator was arrested on March 13, 2009. Respondent did not have any communication with the assigned ADA about securing the rape kit. Respondent also did not communicate with the assigned social worker. Respondent did not recall the outcome of this case.

At some time after the incident, and while Respondent was on scheduled vacation leave, the case was reopened. Lamboy retrieved the rape kit from the hospital and Detective Rama prepared the invoice for the rape kit. The paperwork was attached to Respondent's folder and when he returned from scheduled vacation leave, he reopened and reclosed the case. The rape kit was picked up nine months later on December 10, 2009.

On direct examination regarding Case No. 2009-094 Respondent explained that the reason why there was a video on the internet of the incident was because ADA 1 was part of a documentary on HBO which followed the cases by Manhattan SVS detectives. This case was featured on the documentary which aired on HBO in the summer of 2009 or 2010. There was no internet video of this incident prior to the airing of this documentary.

The victim, a tourist from [REDACTED] was sexually assaulted by the perpetrator at Club Marquis. The victim recalled that she had sexual intercourse with the perpetrator at his residence. She woke up in the perpetrator's residence and the perpetrator dropped her off half way to her house and gave her \$20.00 for cab fare. The victim wanted to go home but her two friends convinced her to go to the hospital and the hospital contacted the SVS. A rape kit was prepared, invoiced and submitted to the lab. Respondent interviewed the victim and she indicated that she was visiting this country and was not sure about moving forward with this case as she was preparing to return to [REDACTED]. Respondent conferred with his supervisors about the case and prepared a DD5 for closing and placed it in the folder.

On about April 29, 2009, Detective Sandomir, the cold case detective, received a DNA hit that matched the perpetrator in this case. Sandomir obtained the perpetrator's information and a photo array was shown to the victim. The victim had not yet left the

country. The victim identified the perpetrator and the perpetrator was subsequently arrested by Sandomir and [SI]. Although it was Respondent's case, Sandomir insisted on conducting the interview and did not allow Respondent to interview the suspect. Since Respondent was left out of the interview process, he asked Lamboy to transfer the case to Sandomir and requested to go home. Lamboy agreed and Respondent went home for the day. The case was transferred to Sandomir who then processed the arrest and testified in court.

Since the victim was not initially sure that she wanted to move forward with the case, Respondent closed the case due to an uncooperative witness and did not canvass the Marquis for video. Respondent did not prepare a DD5 about not having canvassed the Marquis for video. Respondent did not have any communication with [SI] regarding this case. Respondent explained that he did not take follow-up investigative steps because he closed the case due to an uncooperative witness. If a supervisor approves a detective's reason for closing the case, the case is closed.

Respondent averaged about 40 to 45 cases per year. While assigned to SVS, Respondent was not the subject of any charges or specifications or command disciplines.

On cross examination, Respondent stated that he learned how to invoice a rape kit “[a]s my years went on in Special Victims.” A rape kit can be invoiced by the first police officer on the scene or by a police officer or detective in a precinct, or by SVS.

With regard to Case No. 2007-372 Respondent stated that he has prior experience in interrogating suspects. He explained that he did not cease the suspect's interrogation because the suspect did not request an attorney. Respondent did not testify at the suppression hearing.

When questioned with regard to Case No. 2007-432 Respondent did not recall the date when Frasier told him that the rape kit results were negative. Respondent did not know whether a rape kit in this case was prepared because this case did not involve an allegation of rape. He stated that a rape kit is not performed on an individual over 96 hours after the alleged rape. In this case, Respondent did not recall whether 96 hours had already past when the victim made the complaint. Respondent stated that at the time of the incident, he did not know that he should have followed up with Frasier about the results of the rape kit because this was Respondent's second case and he was not sure what he had to do.

With regard to Case No. 2008-359, Respondent maintained that he was ordered by Lamboy to show the cell phone photograph to the victim. Respondent learned from the DA's office that the victim's memory was tainted as a result of having been shown the cell phone photograph.

With regard to Case No. 2008-397 Respondent testified that under Chief Brown, performing a canvass was not a basic investigative step. In addition, the victim had already identified the suspect.

With regard to Case No. 2009-082 Respondent stated that the suspect was arrested and a rape kit was performed on the victim. Respondent did not recall if he had followed up with the hospital after the kit had been collected and a DD5 was not prepared documenting his follow-up. Respondent did not move forward with this case because the victim refused to authorize release of the rape kit.

On being questioned about Case No. 2009-094 Respondent agreed that during his official Department interview, he said that a canvass is a basic step that is self-initiated and does not require a supervisor's permission. Respondent maintained that he did not conduct

a canvass because the victim was uncooperative and because he had submitted the case to be closed. Respondent waited about "a week or two" before he closed the case.

FINDINGS AND ANALYSIS

To best analyze the allegations in this case it makes the most sense to review the investigative cases as they are set forth in the Bill of Particulars and in the testimony of Saladeen-Patel and Respondent.

1. Case No. 2007-372

The Bill of Particulars indicates that the date of occurrence was September 18, 2007. It then goes on to state:

On or about September 26, 2007, during the interview of a suspect, Respondent continued to question said suspect after he had indicated that he had an attorney. At a hearing, a Judge ruled that although the suspect had waived his right to an attorney, his rights had been violated.

Saladeen-Patel testified that she spoke to ADA 1 who complained that a judge had suppressed the statement made by the alleged perpetrator in this case. Saladeen-Patel ascertained that Respondent and another detective, Lane, had gone to Georgia and apprehended the suspect.⁴ Respondent made a video recording of the statement. As I have previously noted, ADA 1 did not provide any material to Saladeen-Patel.

Saladeen-Patel was not allowed to see the video or read a transcript of the statement. She was not allowed to see a copy of the transcript of the suppression hearing nor was she allowed to see the judge's ruling and order. All of the information about the allegedly tainted interview and the judge's ruling are hearsay and possibly double hearsay.

⁴ Respondent gave unchallenged testimony that he interviewed the victim, who knew the suspect. As a result of that investigative work, which he conducted, he and Lane were able to locate and apprehend the suspect.

In fact we do not even know the outcome of the case so it is impossible to determine, what effect if any, the suppression had on the case.⁵

As far as I can recall, this is the first time anyone in this forum has been asked to deem a police action to be misconduct solely because of a suppression ruling. That is not to say that it should not occur, but that it is apparently a first.

Certainly if a police officer ignored a suspect's request for an attorney and continued to question that suspect in obvious and open violation of the suspect's right to be represented by an attorney, disciplinary action would be merited. But where a suspect has waived his rights and the waiver is deemed invalid, the issue is less clear.

To understand the perils of charging Respondent with misconduct based solely because an adverse suppression ruling has been issued without studying the facts, a reading of People v. Lopez, 16 NY3d 375 (2011) is instructive.

An opinion by Associate Court of Appeals Justice Smith, which concurred with the majority in that the appellant's conviction should be upheld, disagreed with the majority finding on suppression of a confession made to a detective. In that concurring opinion Justice Smith wrote:

Over the last several decades, we have described the New York right to counsel that we have created as "pragmatic," "simple," "grounded on 'common sense and fairness,'" "workable" and "comprehensible". The majority quotes all these descriptions today and adds that the law is "eminently straightforward."

I think we protest too much. In reality, our right to counsel jurisprudence is so complicated that it is almost incomprehensible, and it regularly produces unjust results. This case is an example. The majority, struggling to harmonize our cases an attempt which, as I will try to show, does not succeed -- is led to the conclusion that Detective Mattei infringed defendant's right to a lawyer. But it is hard to imagine any case in which

⁵ Saladeen-Patel did not know the disposition but represented that the case was sealed. Respondent said there was a trial and the defendant was found guilty.

a prisoner's waiver of that right could be more free of coercion, deception or any other form of unfairness. The majority finds the waiver bad because Mattei should have realized that a Pennsylvania lawyer was representing defendant on a drug charge completely unrelated to the murder Mattei was investigating; in common sense, the Pennsylvania case should have no bearing at all on the validity of defendant's waiver, (internal citations omitted).⁶

To begin to analyze this part of the specification it is helpful to review the evidence presented to this Court regarding what occurred when the suspect was interviewed.

Saladeen-Patel testified:

We learned that he and another officer had gone to Georgia and apprehended the perp, and during an interview which was videotaped, he did give Miranda warnings. The perpetrator also had simply asked should he have a lawyer, and [Respondent] responded, "Do you want a lawyer?" And he said he didn't need a lawyer, that he would answer the questions.

Respondent testified:

During the interview, of course, I read Miranda warnings to him, had him sign and initial each question and asked him if he understood. He basically said that he had a family lawyer. I then proceeded to ask him if he wanted a lawyer in regards to this case. He said he had nothing to hide and he preferred to answer questions.

These two statements reflect, basically, the only evidence about what occurred. It should be noted that Saladeen-Patel indicated that most of her information came from Respondent.

Given this evidence about what occurred it is difficult to understand why the statement was suppressed. This is not say that I disagree with the judge, but that if there was a ruling suppressing this statement we likely do not have all the information.

⁶ As noted, appellant's conviction in Staten Island Supreme Court, was upheld even though the majority ruled that the statement should not have admitted into evidence. The majority cited the fact that appellant made confessions to at least three other people some or all of whom apparently testified. The majority also noted that there was other evidence of guilt. Further the majority noted that the statement made to the detective was at least partially exculpatory as he claimed to be a passive participant in a robbery where his co-perpetrator, he said, committed the murder. Improper admission of the confession to the detective was deemed "harmless."

If there was indeed a suppression ruling we would still need the facts to determine if there was misconduct by Respondent. Without specific and accurate facts about the interview we can only speculate. For instance, the suspect may have claimed to have an indelible right to counsel (one that is not subject to waiver of Miranda rights without an attorney present) based on what he said about having some kind of prior representation. But that concept is limited in scope and would not seem to apply given the information provided in Respondent's testimony in which he said the subject only claimed to have a general "family lawyer," *see People v. Kirk*, 96 AD3d 1354 (Appellate Division 4th Dept. 2012).

While determining if a criminal defendant has an indelible right to counsel may be relatively objective in nature, determining, in a case where there is no such indelible right, if the waiver has been effectively given requires a more subtle and subjective review of both law and fact.

Our highest New York State court has explained:

When a defendant in custody unequivocally requests the assistance of counsel, any purported waiver of that right obtained in the absence of counsel is ineffective. However, when the defendant's request is not unequivocal, the right to counsel does not attach. Whether a particular request is or is not unequivocal is a mixed question of law and fact that must be determined with reference to the circumstances surrounding the request including the defendant's demeanor, manner of expression and the particular words found to have been used by the defendant, *People v. Glover*, 87 NY 2d 838 (1995), (internal citations omitted).

It is not possible to determine if Respondent ignored the suspect's request for an attorney or made a close call decision that Miranda had been properly waived without an opportunity to review the video and/or read the transcript of Respondent's interview with

the suspect. Certainly the judge's findings and explanation would carry great weight with this Court, but that too is inexplicably unavailable.

As I have just noted, the allegation of misconduct cannot be established substantively. But that is not the whole problem. Another significant reason why Respondent cannot be found to have committed misconduct with regard to this investigative case is there is no substantial evidence. Hearsay evidence is admissible in this forum but generally it cannot carry the whole burden of establishing facts. Certainly it should not be expected to when better evidence exists.

Direct and substantial evidence exist in this case, the video of the questioning, the transcript of that interview, the transcript of the suppression hearing,⁷ the ruling of the unnamed judge, all constitute substantial evidence that was not provided.

If direct evidence is unavailable, that can be considered in accepting hearsay, but the fact that ADA 1 refused to turn material over to Saladeen-Patel several years ago, during the investigation, is not a satisfactory explanation. There is nothing in the record to indicate that the Department appealed to higher authority in the DA's office or resubmitted its request to the DA's office after ADA 1 departure.⁸ Nor is there any indication that the Department sought an unsealing order on its own so that it could litigate this disciplinary action.

For all of the above reasons there can be no finding of misconduct against Respondent regarding this investigative case.

⁷ Respondent said he did not testify at a suppression hearing. It is possible that the video was submitted on consent. Again we do not know and can only speculate but there should be some record of what was said in court on the issue of suppression.

⁸ The parties stipulated that ADA 1 left the DA's office. An article published in the New York Times on August 23, 2011, reported that ADA 1 had announced that her departure from the office was imminent. This was months before this case first appeared on the trial calendar in this forum.

2. Case No. 2007-432

This investigative case involved an alleged sodomy in a men's shelter. It is not disputed that Respondent and another officer went to interview the complainant on or about October 23, 2007, the date of report. It is also not in dispute that on or about December 12, 2007 Respondent filed a report (DD5) which indicated that the rape kit test had come back negative. He also closed out the case at that time.

It is not in dispute that the rape kit had not been analyzed at that point in time. Almost a year later the DA's office received a report based on the rape kit and the results were negative.

Respondent acknowledged that he made a mistake in completing a report noting that the rape kit results were negative in December 2007. He said this was the second case he had handled during his assignment to the SVD and that he had been working with a more senior detective, Frasier, who is now retired. Respondent testified that Frasier had verbally told him in December 2007 that he, Frasier, had spoken with the office of the Medical Examiner and that he had learned that the test had come back negative.

It should be noted that the Bill of Particulars in this case mentions that the DA's office became aware of this case in May of 2008 when the alleged victim complained to the DA's office about the way he had been interviewed by a detective in this case. It was at this time that ADA ADA 2 began inquiring about the whereabouts of the OCME report. She later came to discover the rape kit had not been analyzed and ordered that analysis.

No evidence was presented to establish that Respondent was discourteous or acted inappropriately toward the complainant in this case. Respondent did acknowledge in his testimony that Frasier had doubts about the credibility of the complainant.

It should be noted that the rape kit came back negative, so in the end, Respondent's error had no impact on any criminal case.

Lamboy testified that at that time much of the communication with the office of the Medical Examiner regarding rape kits was by telephone, a practice that has now been changed. It is, however, clear that Respondent engaged in some level of misconduct by reporting in a DDS that the rape kit results were negative without obtaining the actual documentation. Whether, under other circumstances, this event would have risen to the level of formal discipline is less than clear.

3. Case No. 2008-359

The Bill of Particulars indicates that the underlying crime occurred on August 23, 2008. Testimony at the trial indicated that the crime was an attempted rape. The Bill of Particulars in relevant part indicates that:

During his Patrol Guide hearing, Respondent admitted that he showed a single photograph to a victim, after showing that victim a photo array which failed to produce an identification. The victim was unable to recognize the suspect from memory and therefore the lineup was ruled inadmissible and the victim was not allowed to make an in-court identification.

Reading this paragraph one is left with the impression that Respondent committed one of the most serious transgressions a detective can commit; purposefully tainting the identification of a suspect. The concern, of course, is that this is something which could potentially cause the wrong person to be arrested and charged with a crime. As will be seen that is not what happened or even alleged to have happened.

Testimony from Saladeen-Patel and unchallenged testimony from Respondent indicated that the victim recovered the perpetrator's cell phone, a Blackberry, at the scene

of the crime, where the perpetrator dropped it while fleeing. The victim found the phone, looked at it and saw that the picture on the screen was that of the person who had attacked her. The victim showed the photograph to responding officers and said that that was the man who tried to rape her.

Saladeen-Patel testified that ADA [redacted] complained that Respondent had shown the photograph to the victim and that had “taint [ed] the victim’s memory when it came to... pick the person out in court.” Saladeen-Patel testified that the line-up identification was offered in evidence and ruled inadmissible but on further questioning Saladeen-Patel stated that there was no court ruling and that the DA had refrained from using that evidence.

Saladeen-Patel was not asked to provide details of what occurred and the only detailed version we have is the unchallenged testimony of Respondent.

Respondent testified that after receiving the cell phone he and other detectives were able to ascertain the owner. They discovered that he had a prior arrest and obtained the mug shot from that arrest. The mug shot was placed in a photo array which was presented to the victim. She was unable to make an identification. Respondent said that at that point he went to his supervisor, Lamboy, for direction. Lamboy, he said, told him to blow up the picture from the cell phone and show it to the victim. Respondent testified that he and other detectives present at the time advised against this, noting that the DA would object.

Respondent testified that Lamboy insisted that they present the photograph and noted that the detectives worked for the Department and not the DA. Respondent stated that he did show the photograph to the victim who positively identified the subject, but that he did so following orders from Lamboy.

Respondent testified that subsequently the suspect was brought in for a corporeal line-up. As the victim was in the process of identifying him, Respondent testified, the suspect broke down and admitted that he was the perpetrator.

Lamboy testified at this trial as a witness for the Respondent. He claimed no specific recollection of the incident in question but did state that he saw no problem with showing the photograph to the victim as occurred in this case. Lamboy also indicated that detectives under his command work for the Department and not the DA.

Respondent's testimony, that he was following Lamboy's order when he showed the photo to the victim, is credible and is a defense to any claim that he committed misconduct in doing so.⁹

Examining the evidence in this specification demonstrates just how poorly prepared the Advocate's case was, something that impacts on all aspects of this specification.

In the Bill of Particulars the Department claims that "The victim was unable to recognize the suspect from memory and therefore the lineup was *ruled* inadmissible and the victim was not allowed to make an in court identification." This certainly gives the impression that there was a court ruling suppressing the evidence. As I have noted, Saladeen-Patel's testimony was confusing and inconsistent.

Indeed there is confusion about what identification evidence was tainted and what the circumstances of the showing of the individual photograph actually were.

For instance, Saladeen-Patel testified that Respondent showed the photograph to the victim and then the photograph was used in a photo array. She was asked about this on cross-examination and again stated that that was her understanding. The Bill of Particulars

⁹ Saladeen-Patel also testified that Respondent was following Lamboy's order. I did not consider this testimony in evaluating the facts because it is unclear whether she was basing this on her conversation with Respondent or she learned it as some other part of her investigation.

and Respondent's testimony indicate that the photo array occurred first. Respondent further explained that the photograph used in the photo array was not the one taken from the cell phone but was a mug shot of the suspect from an earlier arrest. Respondent's version makes more sense.

This may seem like a detail but it is a good example of the kind of problem that arises with the type of hearsay used in this case. Saladeen-Patel had no involvement in the initial case. The information she received is hearsay and double hearsay. As a result she appears to have made mistakes in her recounting of facts because she had no real frame of reference.

Moreover she knew nothing about the case itself. The Bill of Particulars might lead one to believe that the criminal case was dismissed. But given the full facts of the case Respondent's claim that there was some type of conviction makes sense, after all, the victim herself provided direct evidence of identification in the form of the recovered cell phone.

Further there was no testimony from Saladeen-Patel about the alleged admission by the suspect, which as described by Respondent, was spontaneous and not the result of a police inquiry. Under those circumstances such a statement would ordinarily be admissible.

As I have noted, Saladeen-Patel did not know the outcome of the criminal case. Respondent gave unchallenged testimony that perpetrator pled guilty to a reduced charge.

If there was a conviction the record would ordinarily not have been sealed. The trial record and all other information in the case would be a matter of public record. No

permission from the DA would be necessary to obtain such information. Yet the Advocate did not offer or present any information based on court records.

It is ironic that in his closing argument the Advocate accused Respondent of cutting corners.

4. Case No. 2008-397

The Bill of Particulars for this investigative case reads as follows:

- a. Date of occurrence: September 22, 2008
- b. Prior to closing her case, the assigned Assistant District Attorney spoke with Respondent and he told her that he had conducted a canvass with the victim. Additionally, it was revealed that Respondent had failed to prepare worksheets.
- c. The assigned Assistant District Attorney was preparing to close this case but prior to doing so she met with the victim. The victim told the assigned Assistant District Attorney that a canvass had not been done. Working together using the computer, the assigned Assistant District Attorney was able to find the location where the crime had occurred.
- d. Respondent admitted in his Patrol Guide hearing that he did not conduct a canvass with the victim.

Looking at the above it would appear that there were three acts of misconduct in regard to this case; failing to conduct a canvass, lying to the ADA, and failing to prepare worksheets.

Reading that Respondent failed to conduct a canvass with the victim sounds like a serious failure. Everyone knows that an important method used to catch perpetrators is to get in a car with the victim and go around the area of the crime looking for those perpetrators so that the perpetrators can be identified and apprehended. It turns out that that is not at all what this alleged failure is about.

Respondent provided a detailed and unchallenged account of what the case was about. The victim had been out drinking with co-workers. At the end of the evening one

of those co-workers took her to a hotel in northern Manhattan where they had sex. In the morning she reported the act as a rape. She knew and identified the perpetrator who was not arrested at the direction of the DA. The case was forwarded to the DA, nevertheless.

The canvass referred to in the Bill of Particulars was not a canvass to look for the perpetrator. It would appear from the Bill of Particulars that the canvass Respondent is being charged with failing to have conducted was a canvass to find the hotel where the sexual act had occurred.

If in fact this was an omission it was hardly an omission of any significance. The DA was closing her case because the victim did not wish to proceed. The DA, according to the Bill of Particulars, was able to locate the hotel in question by doing nothing more than a computer search.

The second part of the allegation, that Respondent lied to the DA about having done a canvass, is more serious. Respondent acknowledges not conducting a canvass and denies ever telling the ADA on the case, **[ADA 3]** that he had done so. He did say that he drove the victim home.

Here the problem created by the decision of the Advocate to proceed on a hearsay case comes into focus again. The key problem with hearsay is that it denies the opposing attorney an opportunity to confront the witness through cross-examination. This is not always a sharp and hostile grilling of a witness. It can also be a simple effort to get a witness to see what he or she can recall about an event. More than once I have seen witnesses realize that they did not see or hear what they initially claimed to have seen or heard.

In this case the assigned ADA and the Respondent engaged in what must have been a fairly mundane discussion about a case that was about to be closed. It would certainly be appropriate, before finding Respondent guilty of lying, to ask that ADA if the word "canvass" was used and if indeed that is what Respondent said.

In this case even the investigator, Saladeen-Patel, was not able to ask the ADA those questions. Saladeen-Patel reported to this Court what ADA 1 told her what that ADA had said. In fact, from the testimony before this Court, we don't even know if ADA 1 spoke directly to that ADA or got the information from an intermediary. Hearsay of this nature is, by itself, not sufficient to establish a fact.

The above analysis was done, as I noted, based on the Bill of Particulars. The Bill of Particulars is supposed to put the Respondent on notice as to what the charges are, something that was especially necessary given the broad and general nature of the specification itself. The Advocate, in his opening statement, similarly indicated that one of the acts of misconduct with regard to this investigation was the misrepresentation to the ADA that he had conducted a canvass.

During the cross-examination of Saladeen-Patel's she said something quite different about this alleged act of misconduct. Saladeen-Patel indicated that the alleged lie to the ADA was not part of the charged misconduct. Saladeen-Patel testified "because it became a he said/she said situation, he said he did not give her [ADA 3] that information, he only dropped the victim home and she's saying she recalls this conversation, we didn't determine it to be a failure."

Similarly the purpose of the failed canvass differs in Saladeen-Patel's testimony from what appears to be the issue as put forth in the Bill of Particulars. Saladeen-Patel

testified that because the victim knew where the hotel was, "the canvass was actually for videos, to see if there was any videos in the area or in the hotel and that would be one of the basic steps."

Failing to seek and safeguard evidence is a more significant failure than that set out in the Bill of Particulars. Because there is an inconsistency between the Bill of Particulars and the real gravamen of the misconduct, a determination must be made as to whether this constitutes a change in theory of the case such as to deny Respondent due process.

At first blush this seems like a simple issue; if Respondent did not go to the hotel he could not have determined if there was additional evidence such as a video which could have corroborated the victim's claim that she was brought to the hotel. But on consideration it is not that easy an issue. First of all the Respondent was not charged with failing to look for a video or other evidence, we are merely told he failed to conduct a canvass.

Just as the ADA was able to identify the hotel without leaving her office Respondent could have as well. And he could have called to inquire about video surveillance. While I believe it is extremely unlikely that Respondent did that, there is no evidence to establish that. Respondent wasn't asked about it and it would require conjecture without any proof to conclude that he took no steps to determine if a video existed.

Respondent also noted in his defense that his closing report was submitted to and approved by his supervisor. One of the purposes of such a review is to ensure that all necessary investigative steps have been taken before a case is closed. Apparently no one told him to go back and conduct a canvass.

Then there is the alleged failure of Respondent to prepare "worksheets." The Advocate noted, in his cross examination of Respondent, that Respondent did not do a worksheet regarding his having taken the victim home. As to any other worksheet one has to guess that the Advocate is referring to the worksheet Respondent should have prepared after having conducted the canvass he should have done.

As I have previously noted it might have been an omission to fail to do a canvass to locate the hotel in question. Respondent claims that under procedures then existent in the Detective Bureau such a canvass was not required. Respondent points out that whatever his alleged failures his supervisor reviewed and approved of his closing the case.

Under all the circumstances there is insufficient evidence to say that the failure rose to the level of disciplinary misconduct. If it was not necessarily misconduct to fail to do the canvass then it was not misconduct to fail to do the worksheet.

The failure to note that Respondent drove the victim home on a worksheet is a failure that merits some level of mention. Respondent could not recall where the victim lived and when I asked Respondent was able only to possibly pin her residence down to somewhere in the five boroughs. Failing to record this interaction with the victim would seem to be a violation, a minor violation perhaps, but a violation none-the-less.

5. Case No. 2009-082

The Bill of Particulars for this investigative case reads as follows:

- a. On March 9, 2009, the victim alleged that she was raped. According to worksheets prepared by the Respondent, the victim did not wish to proceed.
- b. On or about March 13, 2009, and arrest was made.
- c. On or about March 17, 2009, Respondent prepared a worksheet and requested that the case be closed. According to the

investigative file, on this day, the assigned Assistant District Attorney met with the victim, who gave her consent to proceed with the case.

d. On or about March 20, 2009, the assigned Assistant District Attorney called Respondent and told him that the victim had signed a release and that the rape kit needed to be picked up from the hospital.

e. On or about December 6, 2009, the assigned Assistant District Attorney received a call from the hospital indicating that the rape kit had not been picked up.

f. On or about December 10, 2009, a voucher was prepared indicating that the kit had been vouchered and collected by Detective Rama.

The gist of the allegations against Respondent, regarding this investigation, deal with three separate issues. One is that he closed the case on March 17, 2009, the second is that the assigned ADA, **ADA 4** told Respondent to pick-up the rape kit and the third is that Respondent did not pick-up the rape kit which was retrieved months later by Rama.

As has been the pattern, Saladeen-Patel did not provide much about the underlying facts of this investigative case. Respondent did.

Respondent gave uncontested testimony that he received a call that the victim had been raped and taken to the hospital. The parties knew each other and at the hospital the victim refused to sign a release allowing him to take the rape kit to be vouchered and sent to the OCME's office for analysis.

While the rape kit remained at the hospital he took the victim back to his office and interviewed her. She identified the perpetrator and gave him information that allowed him to track that individual down. Respondent arrested the perpetrator. The case was assigned to ADA **ADA 4**. Respondent acknowledged that he then closed the case.

Respondent said he informed **ADA 4** that the rape kit was still at the hospital because the victim had refused to sign a release. Respondent denied having any further conversation with **ADA 4** about the rape kit.

At some point later that year he went on vacation. When he returned he learned that Lamboy had picked up the rape kit and that Rama had vouchered it. Lamboy, in his testimony, confirmed that he is the one who picked up the rape kit. Respondent was given paperwork regarding the vouchering of the rape kit, he then re-opened the case to include that material and then re-closed the case.

Respondent notes that when Saladeen-Patel's investigation commenced, he learned that [ADA 4] and a social worker working with the victim had had numerous conversations regarding getting the victim to release the rape kit. This was confirmed by Saladeen-Patel in her testimony.

With regard to Respondent having closed the case on March 17, 2009, there is absolutely no evidence that this was improper. Respondent testified that at the time he closed the case it was his understanding that the victim was not consenting to the rape kit being vouchered and he had arrested the alleged perpetrator within a few days of the alleged rape. There was nothing more for him to do at that point in time.

With regard to Respondent's alleged failure to pick-up the rape kit we have the double hearsay problem again. [ADA 1] told Saladeen-Patel that [ADA 4] had informed her that he saw Respondent in court and told him to pick-up the rape kit. As I have noted before this is not substantial evidence of that fact.

Saladeen-Patel did interview the social worker who confirmed that she got the victim to agree to release the rape kit and that she had told this to [ADA 4]. This corroborates the fact that [ADA 4] knew that rape kit could be picked up but it in no way corroborates the claim that [ADA 4] spoke to Respondent about the release. Apparently

picking up the rape kit was not a particularly onerous task as Lamboy testified that right after he received the call about it he went right to the hospital and picked it up himself.

But whether the task was easy or difficult, there is no substantial and reliable evidence to establish that Respondent was told by **ADA 4** about the victim's release nor is there any substantial and reliable evidence to establish that he was told to pick up and voucher the rape kit.

In sum there is no reliable evidence to establish that Respondent engaged in any misconduct regarding this case.

6. Case No. 2009-094

The Bill of Particulars for this investigative case reads as follows:

- a. On or about March 22, 2009, the victim reported that she was sitting on a sofa in the Marquee¹⁰ Night Club. She further reported that the next thing she remembered was that she woke up naked on a bed with an unknown male on top of her performing sexual intercourse. The victim indicated that she was incapacitated at the time and had not given her consent.
- b. A rape kit was prepared.
- c. Respondent told an investigator from the Manhattan District Attorney's Office that the night club where the crime had occurred, and its security, were uncooperative and that the video was on a 24 hour loop and could not be obtained.
- d. On or about May 14, 2009, Detective Sandomir prepared a worksheet and indicated that he was present in the Marquee Night Club with an investigator from the Manhattan District Attorney's Office and had verified with the manager that there were 64 security cameras and that video is saved for 6 months. The manager authorized the downloading of the video. This was successfully done on or about May 19, 2009, as documented in a worksheet drafted by Detective Sandomir.
- e. Prior to Detective Sandomir's May 14, 2009 worksheet, there were no worksheets prepared by Respondent stating that he conducted a canvass of the Marquee Night Club for video and/or cameras.

¹⁰ This is the spelling that appeared in the Bill of Particulars. Respondent, in his testimony specifically spelled the club's name out as "Marquis."

f. During his Patrol Guide hearing, Respondent admitted that he never went to the club and did not conduct a canvass for cameras and/or video surveillance.

g. Additionally, Respondent failed to prepare proper DD5s reflecting his investigative steps.

Saladeen-Patel, in her testimony, framed the allegation of misconduct as follows:

[REDACTED] ADA 1 was informed via e-mail by Senior Investigator [REDACTED] [REDACTED] spelled [REDACTED] that he had received an e-mail from Detective Astacio stating that he went to the Marquis Nightclub to obtain video, and there was no DD-5 noting it.

Put even more simply, the claim is that Respondent told an investigator with the DA's office that he had gone to the Marquis Night Club, gave false information about the availability of the video of the night in question, and that he failed to complete a worksheet to reflect that visit to the Marquis Night Club.

Respondent denies that he ever went to the Marquis Night Club, never tried to obtain the video, and that he never told [REDACTED] SI [REDACTED] that he did. Moreover Respondent said that the case was closed because the victim was going back to her home country of [REDACTED] and was therefore unavailable to prosecute the case. Further Respondent noted that the closing had been approved by Lamboy.

Once again we are confronted with the hearsay problems. Saladeen-Patel was not able to interview [REDACTED] SI [REDACTED]. There was testimony from Saladeen-Patel that she was informed by ADA 1 that Respondent had sent an e-mail to [REDACTED] SI [REDACTED] stating that he had gone to the club and was unable to obtain video. Saladeen-Patel also stated that [REDACTED] SI [REDACTED] sent an e-mail to ADA 1. We don't even know if [REDACTED] SI [REDACTED] forwarded Respondent's e-mail or if ADA 1 is relying on [REDACTED] SI [REDACTED]'s statement about what Respondent said in his e-mail.

Saladeen-Patel testified that the ADA 1 did not provide her with the e-mail which would be a vital piece of evidence.¹¹

It should be noted that if Respondent had sent SI an e-mail he likely would have done so on a Department computer or Blackberry. If that occurred there would likely be some record of the e-mail and indeed a copy of the e-mail itself. There is no testimony that any effort was made to see if the e-mail could be retrieved from Department databases.

Without a copy of that e-mail, or direct testimony from SI or ADA 1 there is insufficient evidence to establish that Respondent told SI that he had gone to the Marquis Night Club and attempted unsuccessfully to obtain the video.

This brings us to the next part of the allegation, which as will be seen, is more complicated. Respondent is charged with failing to prepare a DD5. Presumably this failure has to do with his having gone to the club and unsuccessfully attempted to obtain the video. Saladeen-Patel did testify that there was no such DD5 in the file.

The matter gets more complicated when one considers Lamboy's testimony on the matter.

[Respondent] from what I understood if I recall correctly, went to the Marquis Nightclub and was told by an individual there that there was no video. I don't recall if he was told there's no longer any video or that there was no video systems at all. He documented this in a DD-5 - I believe, from what I remember, he documented it on a DD5 and I subsequently approved that DD-5.

When asked specifically if Respondent told him about going to the club Lamboy testified:

I don't recall him directly informing me but there was documentation and, therefore, he indirectly notified me by documenting it on a DD5.

¹¹ On cross-examination of Saladeen-Patel we learned for the first time that she had interviewed ADA 1 about this case. Remarkably she stated that there was no mention of the e-mail.

From what I understand about the Detective Bureau's ECMS, once a DD5 is generated it cannot be removed. Consequently Lamboy's testimony about seeing a DD5 is in error. It would appear that in some way, and at some point in the four and a half years since these events, Lamboy came to believe that Respondent had gone to the club, unsuccessfully attempted to obtain video and commemorated it in a report. But because his claim is basically flawed Lamboy's testimony does not corroborate the claim that Respondent e-mailed [REDACTED] SI [REDACTED] about that alleged visit.

It does however highlight the real failure with the handling of this investigation. Respondent should have gone to the Marquis Club looking for video and any other evidence that might have been available. He admits he did not do so.

But he also states that he closed out the case because the victim was a tourist who was going back to [REDACTED] and therefore was uncooperative. Yet the same supposedly uncooperative victim was available five weeks later when detectives pursuing the DNA lead reached out to her.

Apparently this case was hastily, inappropriately and prematurely closed by Respondent; an act that was apparently approved by Lamboy without benefit of the DD5 he now says he saw.

But inappropriately closing a case is not what is charged. What is charged is that Respondent failed to prepare a DD5 for something (going to the Marquis Club to look for video) that he denies having done and which it would appear he did not do.

On the other hand, this failure, the failure to look for evidence is charged in the Bill of Particulars, (subdivision f) and Respondent admits he did not do so. He is certainly guilty of this failure.

In the interest of completeness, one other piece of evidence about this investigation needs to be discussed. In her testimony, Saladeen-Patel indicated that Sandomir, a detective working cold cases who was following the DNA trail in a related case, told her that Respondent had told him that he, Respondent, had gone to the Marquis Club to obtain the videos without success. This of course is not proof that Respondent went to the club and it is double hearsay on the issue of whether Respondent made such a statement. Saladeen-Patel did state that Sandomir still works for this Department but he was not called as a witness.

On further examination of Saladeen-Patel by Respondent's attorney, it was learned that Sandomir did not recover the video from the Marquis Club. That was done by the DA's office, apparently without any problem.

As with Lamboy, Sandomir had an interest in claiming that Respondent told him that he had gone to the club in an unsuccessful attempt to get the video. If Sandomir knew or believed that Respondent had not gone to look for the video it would seem that he should have. Moreover, with the ECMS, Sandomir, like Lamboy, had access to Respondent's investigative reports. It would appear that he should have discovered that there was no record of Respondent having looked for the video.

On the issue of whether Respondent really went to the club and should have prepared a DD5 the statement is of little value as it does constitute proof that Respondent actually went to the club.

On the other issue, whether Respondent told this to [SI] the Sandomir and Lamboy statements add tantalizing fuel to the fire. The fact that two people, Sandomir and

Lamboy, recall Respondent stating that he went to the club but could not obtain video tends to support the claim that Respondent said the same thing to [SI]

Here again we run into the problem of substantial and reliable evidence. Both Lamboy and Sandomir seem to have some interest in having heard Respondent make that claim. Lamboy's recollection is clearly flawed. Sandomir was not called as a witness. But most importantly these statements are not direct proof that Respondent made the claim about going to the club and unsuccessfully looking for video to [SI]

As has been noted, if this occurred actual direct evidence should exist in the form of digital or paper records of the e-mail. Again no such evidence has been presented, nor have [SI] or ADA [] been called as witnesses to testify about something that at least [SI] should have direct and personal knowledge of. There is still inadequate and substantial evidence to establish the alleged communication to [SI]

Respondent is found Guilty with respect to failing to go to the Marquis Club and failing to look for evidence as to this investigation.

The Statute of Limitations Issue

Respondent has raised the issue of the Statue of Limitation, as set forth in Civil Service Law section 75 subd. 4, as barring the prosecution of some of the events in case. It was agreed that the charges in this case were served on Respondent on September 9, 2010. That would mean that any event that occurred prior to March 9, 2009 would be time barred if the statute of limitations applies.

The Department argues that the statute of limitations does not apply. The first issue raised by the Department is a complaint that while the Respondent was served with a Bill of Particulars on March 30, 2012 he waited for trial to raise the issue.

This is incorrect. Counsel for Respondent raised the statute of limitations issue well before the Bill of Particulars was served. Two versions of the Bill of Particulars were served which did not provide specific enough information about the case.

The transcript of the adjournment of May 1, 2012 indicates that I again ordered a Bill of Particulars on that date because there was insufficient information in the second Bill of Particulars; specifically there was a lack of dates, so that there was no ability to even determine if there was a statute of limitations issue. I also indicated that the statute of limitations issue would be dealt with in the Report and Recommendation.

The transcript of the adjournment of May 15, 2012 indicates that on that date the Department finally served a Bill of Particulars which set forth the dates of the investigations which are the subject of this case. A trial was scheduled for July 10, 2012. The case was removed from the trial calendar by the Advocate prior to that date.

In its submission on the statute of limitations issue the Department claims that the six investigative cases are part of a “continuing course of conduct.” Respondent apparently agrees that a course of conduct that continued into the statutory period would give the court jurisdiction over earlier events. Respondent argues that there is no continuing course of conduct, or more correctly, misconduct, in this case.

It is clear that where there is a continuing offense the statute will in effect be tolled. In analyzing what has been accepted in other forums as continuing conduct the Department has put forth several cases as examples. For instance the statute of limitations did not bar

disciplinary action where a correction officer failed to notify his command of his possession of a gun, Dept. of Corrections v. Yan, Oath Index No. 450/88; nor was disciplinary action barred where members of a sheriff's office failed to report knowledge of a crime by fellow officers, Matter of Steyen & Burns, 129 AD2d 994 (4th Dept. 1987). Nor was a disciplinary action alleging "undue familiarity" time barred where a correction officer married and remained married to an inmate, Dept. of Corrections v. Saunders, Oath Index No. 1694/96.

The Department notes that where a crime is continuous the statutory time period is not measured from when the crime began as long as it continues into the statutory period, see People v. Schwenk, 92 Misc.2d 331, 400 NYS2d 291. That case also notes that the determination as to whether a crime is continuous is a factual issue.

No mention was made in the Department's brief of Board of Education v. Honan, Oath Index No. 2231/07 (2008) a case earlier provided by counsel for Respondent. In that case a custodial engineer improperly wrote checks to himself from the custodial account over a period of time starting before but continuing into the 18 month period. The OATH court, citing an earlier OATH case, Dept. Of Housing Preservation and Development v. Parikh; OATH Index No. 785/90 (1990), found that there was no continuing course of conduct and acts outside the 18 month period to be time barred.

The Parikh case, discussed in that decision, involved a supervisor who in violation of department rules employed subordinates in a private business. The Honan court noted that in the Parikh case the court had found no continuing conduct because there were isolated and individual employment dates and that the compensation for each date was individually paid.

OATH decisions are not binding in this forum, but even if I were to reject the rationale offered in the Honan and Parikh cases that still would not justify a finding in the Department's favor in this case.

In both the Honan and Parikh cases the misconduct was at least the same both before and after the statutory deadline. Here what the Department has, at best, is a series of dissimilar acts related only in that they involve job related activities. There is no "overarching scheme or pattern" and given the Respondent's overall work load at SVD these cases may be nothing more than isolated and infrequent occurrences. Indeed Lamboy, who was and is the supervisor of the SVD, testified that basically that is what they were and they fell within the normal range of conduct by detectives in his unit. Even the Department's only witness, Saladeen-Patel also testified that she did not see a pattern of misconduct.

In its brief the Department notes that the instant case is a matter of first impression. Put another way that means no other case like this has been held to have been continuing conduct. There is a reason for that grounded in the fact that what the Department has presented, even if it could establish all of the incidents as misconduct, is not a continuing course of conduct but a series of isolated events which the Department claims involve misconduct.

I have also made findings in each of the cases because the conduct was alleged to be part of this so-called continuous misconduct. Of the four cases that occurred before March 2009 there was a finding of essentially minor misconduct in two. The inability of the Department to establish all of the acts of misconduct it claimed further undermines the argument that there was an ongoing, continuing course of misconduct.

The four incidents which occurred before March 9, 2009 are outside the statute of limitations and the guilty finding regarding two of them cannot be the basis of disciplinary punishment.

Discussion

Because of the usual nature of this case some additional comment is needed. During the trial an effort was made by Respondent to discredit former ADA [ADA 1]. Nothing in the Department's case offset this effort. I do not know, and to the best of my knowledge have never met, Ms. [ADA 1]. But she was, as the record reflects, a prosecutor for many years and the head of a major bureau in the New York County DA's office for a substantial period of time. Whatever the reasons for her departure from the DA's office (a matter about which testimony was elicited) she is entitled to be given more than the benefit of the doubt.

The fact that at the time of the initial log she refused to cooperate may well have been motivated by her own investigation of Respondent [REDACTED]

[REDACTED] During the trial I inquired as to whether efforts were made to obtain the missing materials and to get the cooperation of witnesses. The answers I received indicate that there were no efforts made by the Advocate to obtain those materials or witnesses in this case after [ADA 1] left the office. Nor does it appear that those requests were made to her during her tenure in the DA's office and after her own investigation was complete.

Conclusion

The one specification in this case references six investigations in which Respondent allegedly committed misconduct. He was found to have engaged in misconduct with

regard to two investigations which occurred prior to March 9, 2009. He was found not to have committed misconduct with regard to the other two investigations which occurred before March 9, 2009. All four of these events are outside of the Statute of Limitations and must be Dismissed. The Respondent has been found Not Guilty one of the two events that occurred within the Statute of Limitations and Guilty with the respect to one aspect of another. Therefore with respect to the one specification in the case, it is Dismissed in Part and Respondent is found Not Guilty in Part and Guilty in Part.

Penalty

In order to determine an appropriate penalty, Respondent's service record was examined. See *Matter of Pell v. Board of Education*, 34 NY 2d 222 (1974). Respondent was appointed to the Department on August 30, 1993. Information from his personnel record that was considered in making this penalty recommendation is contained in an attached confidential memorandum.

The Department has recommended a penalty involving the termination of Respondent's employment. Respondent has been found guilty of one part of one of the investigations that were incorporated into this single specification. Respondent's failure to look for evidence led to the hasty and inappropriate closing of that case and is therefore a significant failure which allowed a predator to remain at large. Notwithstanding the significance of this failure it is a singular event that does not justify, in and of itself, immediate termination of employment. Therefore the recommended penalty is that Respondent be DISMISSED from the New York City Police Department, but that his dismissal be held in abeyance for a period of one year, pursuant to Section 14-115 (d) of

the Administrative Code, during which time he remains on the force at the Police Commissioner's discretion and may be terminated at any time without further proceedings. I further recommend that Respondent forfeit 30 vacation days.

Respectfully submitted,


Martin G. Karopkin
Deputy Commissioner Trials



POLICE DEPARTMENT
CITY OF NEW YORK

From: Deputy Commissioner Trials

To: Police Commissioner

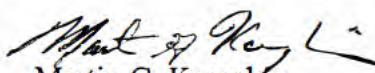
Subject: CONFIDENTIAL MEMORANDUM
DETECTIVE RAFAEL ASTACIO
TAX REGISTRY NO. 914287
DISCIPLINARY CASE NOS. 2010 2512 & 2012-7551

In 2011, Respondent received an overall rating of 4.0 "Highly Competent" on his annual performance evaluation. He was rated 4.5 "Extremely Competent/Highly Competent" in 2009 and 2010. He has been awarded one medal for Meritorious Police Duty.

[REDACTED]

Respondent has been the subject of one prior disciplinary adjudication. In 2001, he forfeited 30 vacation days and was placed on one year dismissal probation for patronizing an off-limits establishment, falsely reporting an incident of aggravated harassment, and failing to comply with orders on three occasions.

For your consideration.



Martin G. Karopkin
Deputy Commissioner Trials